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No. 97-794

In the Supreme Court of the United States

OCTOBER TERM, 1997

CONSOLIDATED EDISON COMPANY OF NEW YORK, ET AL., PETITIONERS

v.

FEDERICO PEÑA, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners have no right to judicial review of the sufficiency of the amounts reserved for individual crude oil overcharge claims from funds recovered by the Department of Energy in public enforcement actions under the former Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* (1982).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 117 F.3d 538. The opinion and order of the district court (Pet. App. 25a-30a) is reported at 4 Energy Mgmt. (CCH) ¶ 26,698.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1997. A petition for rehearing was denied on August 15, 1997. Pet. App. 31a-33a. The petition for a writ of certiorari was filed on November 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to the oil embargo by OPEC (Organization of Petroleum Exporting Countries), Congress enacted the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.* (1982). Under the EPAA, which incorporated by reference portions of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note (1976), the Department of Energy (DOE) and its predecessor, the Federal Energy Authority, issued price control orders governing the sale and resale of crude oil, in amounts and at prices specified in the regulations.

The oil price control regime remained in place until January 1981, when the President ended it by executive order. Executive Order. No. 12287, 46 Fed. Reg. 9909 (1981). The EPAA expired by its own terms on September 30, 1981. 15 U.S.C. 760g (1982). A savings provision, however, preserved enforcement proceedings based on acts committed or liability incurred prior to the expiration date. 15 U.S.C. 754(a)(2) (1982). The DOE's authority to collect overcharges was subsequently repealed, barring actions commenced after September 30, 1988, or six years after the alleged price control violation, whichever was later. 15 U.S.C. 4504(a) (1988).

The EPAA incorporated Sections 207, 209, 210 and 211 of the administrative and enforcement scheme of the ESA. 15 U.S.C. 754(a)(1) (1982). Under Section 207, "functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code." 12 U.S.C. 1904 note (1976). Congress thus withdrew the general cause of action conferred by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*, from

claimants under the EPAA. As for enforcement, Section 209 authorized the government to obtain "restitution of moneys received in violation" of the DOE's price controls. 12 U.S.C. 1904 note (1976). A companion provision, Section 210, provided a separate private cause of action for persons to recover money damages (including treble damages) for violations of the price control regulations. *Ibid.* Section 211 of the ESA provided, in relevant part, that "district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder," and created the Temporary Emergency Court of Appeals with exclusive appellate jurisdiction in such cases. *Ibid.*

2. The DOE's public enforcement program, carried out under Section 209 of the ESA, recovered large sums of crude oil overcharges. The DOE initially employed a variety of remedies pursuant to its enforcement powers, such as compelling restitution by means of refunds to first purchasers, *Midwest Petroleum Co.* v. *United States Dep't of Energy*, 760 F.2d 287 (Temp. Emer. Ct. App. 1985); payments to the United States Treasury, *Payne 22, Inc.* v. *United States*, 762 F.2d 91, 94 (Temp. Emer. Ct. App. 1985); payments in kind to the Strategic Petroleum Reserve, *Champlin Oil Co.*, 47 Fed. Reg. 49,703 (1982); and payments to state energy programs, *United States* v. *Exxon Corp.*, 773 F.2d 1240, 1286 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986).

In 1986, pursuant to a settlement in protracted multi-district litigation, the DOE adopted a uniform restitutionary policy for cases involving crude oil overcharges. *In re Department of Energy Stripper*

Well Exemption Litig., 653 F. Supp. 108, 112-114 (D. Kan. 1986), aff'd, 855 F.2d 865 (Temp. Emer. Ct. App. 1988). Under the *Stripper Well* settlement, the DOE agreed to establish individual escrow accounts for the parties to the litigation, which allowed them to receive a portion of the funds that had been collected by the DOE up to the time of *Stripper Well*. In return, the parties were required to waive all existing and future claims to any other crude oil overcharges recovered by the DOE. *Id.* at 114.

With respect to pending and future crude oil claims by non-parties to the *Stripper Well* settlement, such as petitioners here, the DOE agreed to issue a modification of its restitutionary policy. The modification would allow victims of overcharges to seek restitution by submitting claims to DOE in refund proceedings pursuant to the agency's Subpart V procedures. See 653 F. Supp. at 114; 10 C.F.R. Pt. 205. To pay such claims, the settlement agreement authorized the DOE to reserve up to 20 percent of all crude oil overcharge funds that the agency recovered in enforcement proceedings.[1] Under the agreement, the remaining 80 percent of funds collected are to be divided equally between the States and the federal government to be used for indirect restitution to

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[1] See Order Implementing Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges, 51 Fed. Reg. 29,689, 29,691 (1986). As the DOE explained, the approach "anticipated that the Settlement Agreement w[ould] resolve, by payment from the stripper well funds and accompanying waivers, the majority of claims of individual purchasers of crude oil or refined petroleum products, and the 20 percent reserve, which is subject to downward adjustment, should therefore be more than sufficient to pay claimants." *Id.* at 29,690.

unidentified injured parties.[2] See Settlement Agreement, IV B, 1, 2, 3, 6, *reprinted in* 17 DOE ¶ 90,509 (1988).

Shortly after the *Stripper Well* settlement was approved, Congress enacted the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA), 15 U.S.C. 4501 *et seq.* (1988). The PODRA governs all funds collected by the DOE pursuant to its responsibilities under Section 209 of the ESA, *except* crude oil refunds that are governed by the *Stripper Well* settlement agreement.[3]

The DOE implemented the *Stripper Well* settlement by issuing the required Statement of Modified Restitutionary Policy For Crude Oil Cases, 51 Fed. Reg. 27,899 (1986), announcing the DOE's intention to follow the modified policy in crude oil refund proceedings under Subpart V. DOE solicited comments concerning the appropriate procedures to be employed in such cases, *id.* at 29,689 (1986), and subsequently issued a "Notice Explaining Procedures for Processing Refund Applications in Crude Oil Refund

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[2] Such indirect restitution is required in crude oil overcharge cases because, under DOE's former Entitlements Program, the cost of all crude oil, including overcharges, was effectively spread among all refiners and ultimately to all purchasers in the United States. See *Exxon Corp.*, 773 F.2d at 1274, 1280-1286; *In re Seneca Oil Co.*, 906 F.2d 1445, 1448 (10th Cir. 1990).

[3] The PODRA does not apply to "any amount to which any person or class of persons has an enforceable right * * * governed by the terms and conditions of the settlement approved on July 7, 1986, in In Re: the Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378, in the United States District Court for the District of Kansas * * *." 15 U.S.C. 4501(c) (1988).

Proceedings Under 10 C.F.R. Part 205, Subpart V," 52 Fed. Reg. 11,737 (1987).

The 1987 notice implementing the policy agreed upon in *Stripper Well* provides for a "rolling" refund process in which moneys flow in and out of the reserve fund as overcharge settlements are collected and refund claims are processed. 52 Fed. Reg. at 11,739. The DOE recovers overcharges in enforcement actions and sets aside 20 percent of those funds as an account for future individual claims. The remaining portion is distributed to the States and the federal treasury for indirect restitution. *Id.* at 11,737. Parties who purchased crude oil during the price control years may file overcharge claims. The DOE determines whether a claim has merit and the amount of oil purchased by a party. The DOE then refunds to successful claimants a certain amount of money per gallon of oil purchased. *Id.* at 11,738-11,740.

The amount refunded per gallon is calculated according to the "volumetric method," by dividing the total crude oil overcharge moneys currently available by the total U.S. consumption of petroleum products while price controls were in effect. 52 Fed. Reg. at 11,740. The DOE considered various alternative methods of setting the numerator in the volumetric calculation, and initially settled on a calculation that yielded a volumetric refund of $0.0008 per gallon. That amount is periodically readjusted in response to the overcharge funds the DOE collects. It is currently set at $0.0016. See Notice of Issuance of Interim Supplemental Refund Checks in the Crude Oil Overcharge Special Refund Proceeding, 60 Fed. Reg. 15,562 (1995).

As more moneys are collected, claimants automatically receive a share of the funds. If, after all refund

moneys have been collected and all potential claims have been processed, funds remain, they will be distributed to the States and the federal government as provided by *Stripper Well*. 52 Fed. Reg. at 11,740-11,741; Pet. App. 7a; see *Consolidated Edison Co.* v. *Herrington*, 752 F. Supp. 1082, 1083 (D.D.C. 1990), aff'd, 927 F.2d 1227 (Temp. Emer. Ct. App. 1991).

3. Petitioners, a group of utilities and pulp and paper companies, have filed a number of lawsuits over the past 11 years in an effort to obtain a larger share of crude oil overcharge moneys. See, *e.g.*, *Consolidated Edison Co.* v. *O'Leary*, 4 Energy Mgmt. (CCH) ¶ 26,714 (Fed. Cir. 1997); *Consolidated Edison Co.* v. *O'Leary*, 4 Energy Mgmt. (CCH) ¶ 26,693 (D.D.C. 1995); *Herrington*, 752 F. Supp. at 1085-1086; *Getty Oil Co.* v. *Department of Energy*, 865 F.2d 270 (Temp. Emer. Ct. App. 1988).

In the present case, petitioners filed two complaints in the United States District Court for the District of Columbia. The first of these sought a declaration that the DOE's 20 percent reserve fund was inadequate and illegal and that certain other parties' claims should not be paid from that fund. Pet. App. 8a & n.3. In the second complaint, petitioners challenged the allocation of $275 million the DOE recovered in an enforcement settlement with Occidental Petroleum Corporation. *Id.* at 9a. Petitioners sought to enjoin distribution of 80 percent of the Occidental funds to the States and the federal government under DOE's refund process. *Ibid.*

The district court denied the motion for a preliminary injunction and dismissed petitioners' underlying claims. The court noted that the purpose of Section 209 of the ESA—to enforce public rights and to ensure the enforcement of DOE's regulations—

differed from the purpose of Section 210, which expressly authorizes private actions to recover overcharges. Pet. App. 27a-28a. The court concluded that under this enforcement scheme petitioners had no standing to challenge the DOE's distribution of funds. *Id.* at 28a.

The Federal Circuit affirmed the dismissal of petitioners' complaint. Pet. App. 22a. The court analyzed the viability of petitioners' claims in terms of whether they had a valid cause of action. *Id.* at 13a-14a. Concerning the alleged inadequacy of the 20 percent reserve, the court held that "private claimants have no express or implied cause of action under Section 209 or under the PODRA." *Id.* at 21a. The court held that Section 209 of the ESA creates only a public enforcement right and that a private party's sole right of action under the ESA is the private enforcement remedy created by Section 210. *Id.* at 17a-18a. The court observed that petitioners' challenge to the distribution of the Occidental funds was founded on their claim that the government had settled the case for an inadequate sum. The court of appeals therefore viewed the issue as nonjusticiable because it was based on a decision that was solely "within the discretion of DOE." *Id.* at 21a.

ARGUMENT

The decision of the court of appeals is correct, and this case does not present any legal issue of continuing importance. Accordingly, review by this Court is not warranted.

1. The statutory provisions and regulations underlying petitioners' claim have no continuing force. The government's authority to regulate petroleum prices under the Emergency Petroleum Allocation

Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.* (1982), expired on September 30, 1981. See Energy and Policy Conservation Act, Pub. L. No. 94-163, § 461, 89 Stat. 955, 15 U.S.C. 7605 (1982). The DOE no longer has the power to bring enforcement proceedings for past violations of the price controls, and there are no remaining administrative enforcement proceedings. Once the outstanding claims for restitution are processed, the challenged refund scheme will come to a close. As a result, the question whether the court of appeals properly interpreted the administrative and enforcement provisions of the expired Act is of no continuing significance. Petitioners offer no reason why, notwithstanding the defunct statutory provisions and finite regulatory program involved, this case presents an issue of substantial importance warranting this Court's review. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

2. Review of this case would implicate issues long settled by the agreement stemming from *In re Department of Energy Stripper Well Exemption Litigation*, 653 F. Supp. 108 (D. Kan. 1986), aff'd, 855 F.2d 865 (Temp. Emer. Ct. App. 1988), and Congress's enactment of the Petroleum Overcharge Distribution and Restitution Act of 1986, 15 U.S.C. 4501 *et seq.*, which provided that crude oil funds distribution resolved by the *Stripper Well* settlement would be governed by that agreement. Reopening those issues would upset the expectations of the 56 States and Territories that were parties to the settlement. Those States conduct ongoing energy programs, funded through the DOE's distribution of crude oil enforcement moneys, which provide indirect resti-

tution of overcharges suffered by the general public. Thus reopening the DOE's allocation of overcharge funds would necessarily disrupt the substantial indirect restitution programs carried out by the States.

3. Moreover, the decision of the court of appeals is correct. In examining petitioners' claims, the court properly applied the standard for determining whether a private cause of action should be found to be implied by a statute not expressly providing one, as set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). See also *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 145 (1985). Under that standard, petitioners are not entitled to judicial review.

Contrary to petitioners' suggestion (Pet. 18) that courts have universally entertained review of challenges to the DOE's enforcement decisions under Section 209, such claims have consistently been rejected. It is true that courts have based those rejections on different legal theories. Some, like the district court in this case, have focused on a lack of standing. See *Payne 22, Inc.* v. *United States*, 762 F.2d 91, 93 (Temp. Emer. Ct. App. 1985); *Midwest Petroleum Co.* v. *United States Dep't of Energy*, 760 F.2d 287, 290 (Temp. Emer. Ct. App. 1985); see also *Cities Serv. Co.* v. *Department of Energy*, 715 F.2d 572, 573 (Temp. Emer. Ct. App. 1983). Others, like the court of appeals here, have analyzed the issue in terms of the lack of a cause of action. See *Consolidated Edison Co.* v. *O'Leary*, No. 97-1242, 1997 WL 763045 (Fed. Cir. Dec. 12, 1997). In challenges to administrative action, these two concepts sometimes overlap. See *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 456 (1974). The bottom line is that courts have generally

and correctly found that private parties cannot challenge enforcement decisions under Section 209 that are not directed to the individuals bringing suit. Petitioners' case is no exception.[4]

As the court of appeals observed, the EPAA includes a comprehensive enforcement scheme, clearly divided between public and private rights. Congress expressly excluded the EPAA from the general cause of action provided by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.* 15 U.S.C. 754 (1982); see also 12 U.S.C. 1904 note (1976). Nothing in the language or structure of the EPAA suggests any intention on the part of Congress to create a private cause of action against a government agency under Section 209. Government and private actions brought under the petroleum regulations "vindicate different rights." *Cities Serv.*, 715 F.2d at 574. The fact that private parties ultimately receive some benefit from the DOE's collection and distribution of overcharges under Section 209 does not create a cause of action under that provision. Cf . *Getty Oil Co.* v. *Department of Energy*, 865 F.2d 270, 275 (Temp. Emer. Ct. App. 1988).[5]

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[4] Furthermore, petitioners' claims are substantively meritless. The derivation of petitioners' alleged entitlement to 31-32 percent of crude oil overcharges collected (Pet. 5) is unclear. Petitioners point to nothing in the record to support that contention or to show that 20 percent of the enforcement funds eventually collected will fail to fully compensate them. Nor was there ever any promise made or right conferred to a 100 percent recovery by individuals of all their claimed overcharges.

[5] Petitioners' claim in this case is wholly statutory; they have not urged any constitutional claim.

Petitioners contend (Pet. 10, 13-14) however, that they based their action on Section 211 of the Act. But the language of that Section clearly indicates that it was intended to create jurisdiction only to hear claims the ESA would otherwise support—for instance, a challenge to an administrative order directed to the party bringing suit. See *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resource Ltd.*, 577 F.2d 712, 713 (Temp. Emer. Ct. App.), cert. denied, 439 U.S. 831 (1978). As the court of appeals recently recognized, "nothing in section 211 purports to create a cause of action over which the district courts may exercise their section 211 jurisdiction." *Consolidated Edison Co.*, 1997 WL 763045, at *15. Petitioners provide no rationale for reading Section 211 against its plain meaning to create an independent cause of action. They cite nothing from the legislative history to suggest Section 211 was intended as anything but a straightforward grant of jurisdiction. The case on which they rely, *McCulloch*, holds only that Section 211 provides jurisdiction for courts to hear challenges to administrative orders directed to the parties bringing suit. See 577 F.2d at 717-718.[6]

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[6] In challenging the DOE's handling of the Occidental settlement, petitioners assert (Pet. 18-24) that the court of appeals' decision conflicts with that court's own earlier decision in *Mullins* v. *United States Department of Energy*, 50 F.3d 990 (Fed. Cir. 1995). Even if true, that claim would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Moreover, petitioners are incorrect. As the court of appeals explained, *Mullins* recognized that a challenge to the DOE's allocation of a settlement fund based on the inadequacy of that fund to cover claims by third

In short, the court of appeals correctly concluded that petitioners had no right to judicial review of the adequacy of the funds reserved for individual restitution claims or of the DOE's allocation of its settlement with Occidental. Petitioners have failed to show any conflict between the court of appeals' decision and this Court's precedent. Nor have they presented any issue of recurring importance warranting this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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parties "is effectively unreviewable on appeal." Pet. App. 20a (citing *Mullins*, 50 F.3d at 993).